

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

A. CHARLES PERUTO, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HOO IN KIM; ELI HOLZMAN; PATRICK REARDON; JOSH MILLER; IPC TELEVISION, LLC; AMAZON ALTERNATIVE LLC; and ROC NATION, LLC,	:	CIVIL ACTION NO. 18-cv-4468-PBT
	:	
Defendants.	:	
	:	

**MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS**

Prominent Philadelphia criminal defense attorney A. Charles Peruto, Jr. granted an interview to talk about his client, the Honorable Genece Brinkley, in connection with an upcoming documentary. That documentary will address the public controversy surrounding Judge Brinkley's handling of the criminal case against famed rapper Meek Mill. According to Peruto, after the on-camera interview, the film crew surreptitiously recorded him making "off the record" statements criticizing his client. Unhappy that portions of this harsh criticism were subsequently disclosed, Peruto seeks to seize control of the recording, block its further release, and obtain damages as retribution. To accomplish those goals, Peruto has filed multiple lawsuits, including this action for replevin.

Peruto cannot state a plausible claim for relief under his ill-fitting replevin theory. The purpose of a replevin action is to regain personal property belonging to the plaintiff that is wrongfully in the possession of the defendant. Neither Peruto's spoken words nor the digitized recording of those words are the type of tangible personal property that can be recovered in

replevin. Peruto's claim fails as a matter of law for the additional reason that he does not own, let alone have an exclusive right to possess, the physical media on which the recording is stored. Accordingly, his Amended Complaint should be dismissed with prejudice.

STATEMENT OF FACTS

This case arises from the production of a documentary series about famed Philadelphia rapper Robert Rihmeek Williams – professionally known as Meek Mill. The series will examine Mill's rise to fame and “his 10-year battle with Philadelphia justice officials.” Am. Compl. ¶ 38, Dkt. 16. The series will use Mill's experience to address “the larger issue of high incarceration rates for people of color.” *Id.* The series is scheduled for release in 2019. *Id.*

One of the Philadelphia justice officials at the center of the controversy involving Mill is the Honorable Genece Brinkley, a judge on the Philadelphia County Court of Common Pleas. Judge Brinkley has overseen Mill's criminal case for over a decade, beginning with the trial proceedings that led to his conviction on charges of gun and drug possession. *See generally Commw. v. Williams*, No. CP-51-CR-0011614-2007 (Phila. Cty. C.C.P.). Judge Brinkley's handling of Mill's case has become the center of a public controversy and received substantial attention as a result of accusations leveled by Mill and his supporters. *See, e.g., Commw. v. Williams*, Nos. 29 EM 2018, 30 EM 2018, 31 EM 2018, 59 EM 2018, 71 EM 2018 (Pa.).¹

¹ *See also, e.g., Meek Mill, Prisoners Need a New Set of Rights*, THE NEW YORK TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/opinion/meek-mill-criminal-justice-reform.html>; Daniel Victor, *Meek Mill Is Released From Prison on Bail*, THE NEW YORK TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/arts/music/meek-mill-released.html>; Joseph A. Slobodzian, *Meek Mill vs. Judge Genece Brinkley: The odds don't look promising*, THE PHILADELPHIA INQUIRER (Nov. 10, 2017), <http://www2.philly.com/philly/news/crime/meek-mill-judge-genece-brinkley-jail-probation-record-20171110.html>; Claudia Lauer, *Judge denies rapper Meek Mill's request for new trial*, WHYY (June 26, 2018), <https://whyy.org/articles/judge-denies-rapper-meek-mills-request-for-new-trial/>. Defendants cite these press reports to explain the nature of the public controversy surrounding Mill and the upcoming documentary and to give context for Peruto's lawsuits. Defendants do not rely on any facts outside of the allegations set forth in the Amended Complaint for purposes of their motion to dismiss.

Among other things, they have accused Judge Brinkley of imposing excessive prison sentences on Mill for alleged technical probation violations, and criticized her for denying his petition for a new trial based on allegedly false testimony by his arresting officer, even though that petition was supported by the Philadelphia District Attorney's Office. *Id.*

In connection with the public controversy surrounding Mill's case, Judge Brinkley retained Peruto. *See* Am. Compl. ¶ 1. Peruto subsequently agreed to be interviewed for the documentary. *Id.* ¶¶ 3, 37, 39. Peruto alleges that after the on-camera interview was completed, he "instructed the interviewer . . . to go off the record and to stop recording."² *Id.* ¶ 41. Peruto further alleges the interviewer agreed and then pointed the camera toward the wall, at which point Peruto made "off the record" statements.³ *Id.* ¶¶ 5, 41. Yet, according to Peruto, "[u]nbeknownst" to him, "the audio was left on," and his statements were recorded. *Id.* ¶ 42. Some of those statements were "leaked to the press," *id.* ¶ 47 – specifically, Peruto's harsh criticism of Judge Brinkley's conduct in handling Mill's case, including his statement that she "looks f---ing awful" and should grant Mill's petition for a new trial, *see* Mark Fazlollah, *Philly*

² Peruto falsely alleges that defendant Hoo In Kim was the interviewer. *See, e.g.*, Am. Compl. ¶ 11. As explained in Ms. Kim's separate motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), she was not, in fact, the interviewer and had no involvement whatsoever in the production of the documentary series. For purposes of this motion to dismiss, however, the identity of the interviewer is irrelevant.

³ Although this Court must accept Peruto's factual allegations as true for purposes of this motion, *see James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012), his allegations are completely false: The recording itself demonstrates that he neither asked to go off the record nor instructed the interviewer to stop recording. In truth, after the interviewer stated that he had no further questions, Peruto cracked a joke, said "[l]et me tell you something. That was hard to do because . . .," and then proceeded with his criticism of Judge Brinkley, in blatant violation of his fiduciary duty of loyalty to his client. Contrary to Peruto's contentions, no one "manipulated" his words or "illegally intercepted" his comments. Am. Compl. ¶ 47. In addition, Peruto fails to mention in his pleading that, before being interviewed for the documentary, he signed a release permitting his voice and conversation to be recorded, granting permission for that recording to be used forever in any manner, and agreeing that this contract could only be altered through a written amendment.

Judge Genece Brinkley's lawyer on tape: Meek Mill should have gotten new trial, THE PHILADELPHIA INQUIRER (July 3, 2018), <http://www2.philly.com/philly/news/meek-mill-genece-brinkley-charles-peruto-mistake-tape-recording-20180703.html>; Judge Brinkley: Even HER Lawyer Says . . . Grant Meek a New Trial Already!, TMZ (July 17, 2017), <http://www.tmz.com/2018/07/17/meek-mill-judge-brinkley-attorney-new-trial-audio/>.

Peruto responded to this embarrassing revelation by filing a series of lawsuits in state court against the companies producing the documentary, including this action for replevin. *See Peruto v. Sixx Degrees Media, et al.*, September Term 2018, No. 1275 (Phila. Cty. C.C.P.) (discontinued without prejudice Sept. 27, 2018); *Peruto v. Sixx Degrees Media, et al.*, September Term 2018, No. 1304 (Phila. Cty. C.C.P.) (discontinued without prejudice Sept. 27, 2018); *Peruto v. Sixx Degrees Media, et al.*, September Term 2018, No. 2399 (Phila. Cty. C.C.P.) (removed Oct. 18, 2018). After this case was removed to federal court, Peruto amended his Complaint to drop one defendant that has nothing to do with the documentary, correct the names of the three corporate defendants who are producing the documentary, and add as defendants individuals who work for those companies. He also filed a second lawsuit against the same defendants arising from the same set of facts, asserting claims under the federal Wiretap Act, 18 U.S.C. § 2511, and seeking to be awarded compensatory and punitive damages and obtain his attorneys' fees. *See Peruto v. Kim, et al.*, No. 2:18-cv-4818 (E.D. Pa.) (the "wiretap action").⁴

In support of his replevin theory in this case, Peruto alleges that the defendants "illegally intercepted" and "digitized" his comments, which then were "leaked to the press." Am. Compl. ¶ 47. He further alleges that the "digitized communications" created during the interview are his

⁴ Defendants simultaneously are moving to dismiss Peruto's wiretap action. Because the factual allegations in the two cases are nearly identical, the "Statement of Facts" in support of defendants' motions in the two cases also mirror each other.

“property,” *id.* ¶ 51, and that he “has an immediate right to the sole and exclusive possession of” them, *id.* ¶ 52. For relief, Peruto seeks “immediate return and sole possession” of the audio recording while this lawsuit is pending; “permanent, sole possession” of the recording upon entry of a final judgment; the “confirmed destruction of all copies” of the recording in defendants’ possession; “a detailed listing of every third party” to whom defendants have provided the recording; and “a prohibition against” defendants’ use of the recording “in any fashion,” including in the upcoming documentary series. *Id.* at 10; *see also id.* ¶¶ 20-21.

ARGUMENT

The purpose of a replevin action is to regain possession of personal property belonging to the plaintiff that has been wrongfully detained by the defendant. *See Int'l Elecs. Co. v. N. S. T. Metal Prods. Co.*, 88 A.2d 40, 42-43 (Pa. 1952); 17 Standard Pennsylvania Practice 2d § 96:2. In order to succeed on a replevin claim, the plaintiff must (a) have a property interest that is subject to replevin, and (b) establish title and an exclusive right to possess the property. *See, e.g., Commw. v. Dean*, 369 A.2d 423, 425 (Pa. Super. Ct. 1976); *Int'l Elecs. Co.*, 88 A.2d at 43. Peruto cannot meet either of these requirements.

I. Peruto Has No Property Interest That Is Subject To Replevin.

As the Pennsylvania Supreme Court has long instructed, “[r]eplevin is an action undertaken to regain possession of goods and chattels.” *Int'l Elecs. Co.*, 88 A.2d at 42. To pursue a replevin action, a plaintiff must hold a “property right in the thing taken or detained.” *Id.* at 42-43. Only “specific property capable of identification and delivery” can be recovered in replevin. 1 Pennsylvania Civil Practice § 19.02; *see also, e.g., Dean*, 369 A.2d at 425 (plaintiff could not recover cash in replevin where there was no “possibility of positive identification of the currency in question”).

Peruto's replevin claim fails for a basic and threshold reason. He alleges the property at issue is the "oral communication" defendants recorded. Am. Compl. ¶ 20. Peruto's spoken words, however, are not goods or chattel. And, in turn, the words he uttered are not physical property subject to a replevin action as a matter of law.

Peruto cannot dodge this obvious bar to his replevin claim by seeking to cast the property at issue as "digitized communications." *Id.* ¶ 50. Under black-letter law, replevin, like the related tort of conversion, is not available to recover intangible personal property unless it is embodied in a physical object. *See* 77 C.J.S. Replevin § 8 ("Replevin will not lie for incorporeal personal property, such as shares in a corporation or a business and its good will. However, physical objects representing intangible property rights may be recovered in a replevin action, such as stock certificates, where the issue is the plaintiff's entitlement to immediate possession of the physical object, and not ownership of the intangible right represented by the tangible evidence."); 2 Summ. Pa. Jur. 2d Torts § 14:2 (2d ed.) (replevin is "similar to conversion in subject matter and wrong committed").

The law thus provides that "property" that exists only in digital form, such as social media accounts, software, satellite signals, and internet domain names, is not subject to conversion and cannot be recovered through a replevin action. *See, e.g., Hydrogen Master Rights, Ltd. v. Weston*, 228 F. Supp. 3d 320, 334-35 (D. Del. 2017) (no replevin or conversion claim for audio recordings containing confidential information); *Eagle v. Morgan*, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013) (no claim for social media account); *Apparel Bus. Sys., LLC v. Tom James Co.*, 2008 WL 858754, at *19 (E.D. Pa. Mar. 28, 2008) (no claim for software); *DirecTV, Inc. v. Frick*, 2004 WL 438663, at *2 (E.D. Pa. Mar. 2, 2004) (no claim for

satellite signals); *Famology.com Inc. v. Perot Sys. Corp.*, 158 F. Supp. 2d 589, 591 (E.D. Pa. 2001) (no claim for internet domain names).

Peruto does not – and cannot – identify any physical object in which he has a plausible property right. Instead, he seeks to recover “digitized communications” – precisely the kind of “property” courts have held is not subject to replevin. In *Hydrogen Master Rights, Ltd. v. Weston*, a federal court in this Circuit addressed a nearly identical set of facts and rejected replevin and conversion claims under analogous Delaware and Michigan law. 228 F. Supp. 3d at 334-35. In that case, the plaintiffs, like Peruto, sought to use a replevin claim to obtain audio recordings made by the defendant. *Id.* The plaintiffs, like Peruto, alleged those recordings contained their confidential information. *Id.* In response, the defendant argued that he owned the recordings “because he made them with his own recording equipment.” *Id.* at 335. The plaintiffs countered that ownership of the recordings was “irrelevant” because they owned “*the contents*” of the recordings. *Id.*

In other words, as the court put it, the plaintiffs sought “to assert control over the use and distribution of the intangible information recorded.” *Id.* The court rejected that claim because the plaintiffs did not have “any ownership interest in the tangible property that contain[ed] the recordings.” *Id.*; see also *ComRent Int'l, LLC v. Palatini*, 2013 WL 5761319, at *5 (E.D. Pa. Oct. 24, 2013) (reviewing Pennsylvania law on replevin in connection with a motion to dismiss for lack of venue and concluding that “the Pennsylvania replevin remedy would appear to be of little use to the plaintiffs” because they sought to recover intellectual property that was stored “on computers at defendant's residence”).

The same is true here. Peruto does not seek to recover tangible property. Instead, he seeks to obtain an intangible copy of supposedly confidential “digitized communications” and to

control what defendants can do with the contents of that digital recording.⁵ Like the plaintiffs in *Hydrogen Master Rights*, his claim fails as a matter of law and should be dismissed.

II. Peruto Cannot Establish That He Has Title And An Exclusive Right Of Possession.

Setting aside that a “digitized communication” is not the type of property subject to replevin, Peruto’s claim fails for another, independent reason: He does not have title and an exclusive right to possess the digital audio recording or any tangible object that contains the recording. *See ComRent Int’l*, 2013 WL 5761319, at *5 (“To be successful in a replevin action, a plaintiff must show not only title, but also the exclusive right of immediate possession of the property in question.”).

Peruto acknowledges the audio recording at issue was made and stored by “defendants’ personnel.” Am. Compl. ¶¶ 5-6; *see also id.* ¶ 28. He does not claim to own any of the equipment they used to record the interview or store the recording. Indeed, he alleges that the recording was made on “defendants’ devices.” *Id.* ¶ 9. To the extent copies of the recording exist on tangible objects, such as defendants’ computers or storage media, Peruto has no property interest in those objects, much less title and the exclusive right to possess them. *See Hydrogen Master Rights*, 228 F. Supp. 3d at 334-35; *ComRent Int’l*, 2013 WL 5761319, at *5.

⁵ The relief Peruto seeks underscores why he cannot state a replevin claim. He demands “sole possession” of the recording, while also demanding “confirmed destruction of all copies” of the recording, “a detailed listing of every third party” who may have the recording, and a “prohibition” on defendants’ use on the recording. Am. Compl. at 10. In making these demands, Peruto implicitly concedes that the “digitized communications” are property that can exist in multiple places at once and, unlike a tangible object, are not capable of being returned to his “sole possession.” *See Apparel Bus. Sys.*, 2008 WL 858754, at *19 (“[T]here is no physical object required to operate the plaintiff’s software; the defendants have not carried off a disk containing the plaintiff’s program and refused to give it back. The plaintiff’s rights in its intangible property, the software, are not embodied in a particular document, and the software is not subject to conversion.”).

Peruto's Amended Complaint suggests that defendants' alleged illegal interception somehow gave him a property interest in the "digitized communications." Am. Compl. ¶¶ 49, 51. This suggestion, however, misapprehends the nature of both replevin and the federal Wiretap Act under which he has filed a separate lawsuit, 18 U.S.C. § 2511. Replevin is designed to protect a person's right to *property*, while the Wiretap Act is meant to protect the person's right to *privacy*. *See, e.g., United States v. Cianfrani*, 573 F.2d 835, 855 (3d Cir. 1978) (explaining that "'the protection of privacy was an overriding congressional concern'" in the creation of the Wiretap Act) (quoting *Gelbard v. United States*, 408 U.S. 41, 48 (1972)). A violation of the latter does not create a right to the former. Indeed, defendants are aware of no authority supporting the notion that a Wiretap Act violation confers a person with title and an exclusive right to possess the media containing an illegally intercepted communication.⁶

Because Peruto has no title in, or exclusive right to possess, the media containing the recording of his spoken words, he cannot state a claim for replevin.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed with prejudice.

⁶ Defendants deny Peruto's factual allegations. *See supra* at 3 n.3. Nor has there been any violation of the federal Wiretap Act for the reasons set forth in their separate motion to dismiss the wiretap action. But, the Court need not reach that issue to dismiss Peruto's replevin claim.

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Respectfully submitted,

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